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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 204

MISSISSIPPI RIVER FUEL CORPORATION,
Petitioner,

v.

GUSTAVE F. KOEHLER,
Respondent.

No. .....

MISSISSIPPI RIVER FUEL CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Mississippi River Fuel Corporation, your petitioner, prays that a writ of certiorari issue to review the judgments of the Court of Appeals for the Eighth Circuit entered in the above entitled cases on April 23, 1959.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Missouri is printed at pages 135-139 of the District Court record and is reported at 164 Fed. Supp. 844. The opinion of the Tax Court is printed at pages 162-184 of the Tax Court record and is reported at 29 T. C. 1248. The opinion of the Court of Appeals is printed at pages 1a-12a of the Appendix hereto and is reported at 266 F. 2d 190. [Inasmuch as nine additional copies of the records as printed for the Court of Appeals have been filed in accordance with Rule 21 (4) the opinions of the District Court and of the Tax Court are not appended to this Petition. Rule 23 (1) (i).]

JURISDICTION.

The judgments of the Court of Appeals were entered on April 23, 1959 (pp. 13a-14a of Appendix). The jurisdiction of the Court is invoked under the provisions of 28 U. S. C. A., Section 1254 (1).

QUESTION PRESENTED.

Whether an employer who makes contributions out of his profits to a plan for the exclusive benefit of his employees is to be denied a deduction for such contributions in computing his income tax liability on the ground that since the employer's contributions are not expressly geared to nor made payable out of his profits the plan does not constitute a "profit sharing plan" within the meaning of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED.

The statutes involved are Sections 23 (p) and 165 (a) of the Internal Revenue Code of 1939, as amended. The Regulations involved are Regulations 111, Section 29.165-1. The statutes and regulations are set out at pages 14a-26a of the Appendix.

STATEMENT.

The taxpayer is the same in both cases, and with the exception of the taxable years involved, the issues in the cases are identical. They were briefed and argued together in the Court of Appeals and the Court rendered a single opinion covering both cases (App. 1a).

Petitioner is a Delaware corporation with its principal office at St. Louis, Missouri. It owns and operates a natural gas pipeline extending from Texas into Missouri and Illinois (D. C. R. 140, T. C. R. 164). Petitioner's total number of employees during the period 1950 through 1952 ranged from approximately 450 to approximately 670 (D. C. R. 140, T. C. R. 81). Its net taxable income for each of the years 1950 through 1952 varied from approximately $7,100,000 to $8,900,000 (D. C. R. 41-42, T. C. R. 164).

In November, 1949, Petitioner's board of directors authorized an "employees' savings plan," effective January 1, 1950 (D. C. R. 40, T. C. R. 165). The plan was available on an equal basis to all employees with one year of service. It provided that each employee joining the plan could contribute not less than $5.00 nor more than $75.00 per month in multiples of $5.00. Petitioner would contribute an equal amount and deposit the total with a bank as trustee. At the end of three years the plan was to terminate and the trustee was to send to each participant the amount

due him. Each employee who participated in the plan until its termination was to receive the total amount of his contributions, an equal amount contributed by the company, and a pro rata share of any trust income and the company's contributions on account of employees whose rights thereto had been forfeited. Those employees who were laid off through no fault of their own or were retired prior to termination were to receive the total amount of their own contributions plus the matching company contributions. An employee who withdrew from the plan or left the employ of the company voluntarily or was discharged for cause prior to termination was to receive back only his own contributions. The company reserved the right to modify, suspend or discontinue the plan at any time, but such action could not be retroactive nor affect the rights of employees which had accrued at the time of such action. It was specifically provided that no part of the corpus of the fund was to be used for any purpose other than the exclusive benefit of the employees. The plan did not employ the term "profit sharing" and did not make reference to or require that the company's contributions be paid out of profits (T. C. R. 167-171).

A trust agreement was entered into by the petitioner and a local bank giving effect to the provisions of the plan (D. C. R. 140, T. C. R. 73-80). Throughout 1950, 1951 and 1952 both the plan and the trust were operated in accordance with their terms (D. C. R. 141, T. C. R. 173). The percentage of eligible employees participating during this period (excluding part-time employees) ranged from 89.2 per cent to 97 per cent (T. C. R. 173). Petitioner accrued on its books and paid into the trust fund the following respective amounts:

1950	$ 89,190.00
1951	104,025.00
1952	123,855.00

On December 31, 1952, the trust terminated in accordance with its provisions and the trustee distributed a total of $616,963 to the participants (D. C. R. 41, T. C. R. 173, 174).

Pursuant to authority granted by petitioner's board of directors, under date of January 2, 1953, a new trust agreement was executed in substantially the same form as the original agreement and covering the years 1953 through 1955; and under date of January 3, 1956, a trust agreement covering the years 1956 through 1958 was executed. The provisions of the latter agreement were substantially the same as those of the earlier years except that the individual rights of each of the employees participating were made vested and non-forfeitable in all events (D. C. R. 42-43, T. C. R. 174-175).

A number of years prior to inauguration of the above plan, the petitioner had established various other welfare programs for its employees, including a retirement plan and a hospitalization program. When the retirement plan was instituted and when subsequently certain modifications were made therein, petitioner had submitted the plan to the Pension Trust Division of the Bureau of Internal Revenue and obtained a ruling to the effect that the plan met the requirements of Section 165 of the Internal Revenue Code, as amended (T. C. R. 175-176). Petitioner did not submit its savings plan to the Bureau of Internal Revenue for approval. In its income tax returns for the years 1950, 1951 and 1952 petitioner claimed deduction for its contributions to the savings plan under the heading "Employees Welfare and Benefits" and it did not attach to the returns an information statement regarding the plan (D. C. R. 142, T. C. R. 176).

In 1953 certain issues pertaining to petitioner's taxes for the years 1949 and 1950 were before the Tax Court. At that time the Commissioner of Internal Revenue by

amended answer challenged the deductibility of petitioner's contributions to the savings plan for the year 1950. The original issues before the Tax Court were disposed of by stipulation, leaving only the deductibility of contributions issue which was tried and decided adversely to the petitioner by the Tax Court (T. C. R. 163). Upon audit of petitioner's returns for the years 1951 and 1952 the Commissioner disallowed petitioner's contributions for those years and assessed deficiencies. Petitioner paid these deficiencies, filed timely claims for refund and upon disallowance instituted action in the United States District Court for the Eastern District of Missouri. That court also held adversely to petitioner (D. C. R. 142).

The Commissioner's original objections to petitioner's plan were based upon an alleged lack of "permanency" and the fact that not all contributions were required to be accumulated in the trust for at least two years prior to their disbursement. Petitioner was informed that if appropriate amendments to the plan and trust were made, the plan would receive the Commissioner's approval. Believing these requirements to be unwarranted additions to the statutory requisites, petitioner declined to make the changes insisted upon by the Commissioner. Later the attorneys for respondents raised the additional objection that the plan was not qualified under Section 165 of the Internal Revenue Code because it was not a "stock bonus, pension, profit-sharing or annuity plan" (D. C. R. 127-128, T. C. R. 117, 126).

The Tax Court and the District Court each found that petitioner's plan was not a "stock bonus, pension, profit-sharing or annuity plan" within the meaning of Sections 23 (p) and 165 (a) of the 1939 Internal Revenue Code as amended; that it was a plan providing for the payment of deferred compensation under which the employees' rights were, on an individual basis, forfeitable, and that accord-

ingly petitioner's contributions were not deductible. These courts did not pass upon the issues originally raised by the Commissioner (D. C. R. 139-143, T. C. R. 176-184).

Petitioner filed a petition for review of the decision of the Tax Court (T. C. R. 186-189) and appealed from the decision of the District Court (D. C. R. 144, 145). The Court of Appeals affirmed both the Tax Court and the District Court (Appendix pp. 13a, 14a).

REASONS FOR GRANTING THE WRIT.

In holding that the plan which petitioner established for the benefit of its employees "was not a profit-sharing plan and contributions thereto were accordingly not deductible as such" (C. A. Op., App., infra, pp. 11a, 12a), the Court of Appeals applied a restrictive and narrow interpretation of the Internal Revenue Code which is in conflict with the decisions of other Circuits which have held that the basic purpose of Congress was simply that employee plans be operated for the welfare of the employees in general and that such purpose should "be liberally implemented." **Lincoln Electric Co. Employees' Profit-Sharing Trust v. Commissioner,** 190 F. 2d 326, 330 (6th Circuit); **McClintock-Trunkey Co. v. Commissioner,** 217 F. 2d 329, 331 (9th Circuit); **Commissioner v. Produce Reporter Co.,** 207 F. 2d 586, 587 (7th Circuit).

The basic issue presented by these cases is of great importance in the proper administration of the income tax laws of the United States in that it defines for employers and employees throughout the United States the limits within which they may agree upon a form of profit-sharing which will not be subjected to adverse income tax consequences of an almost confiscatory nature. The fundamental question raised by these cases is: What

constitutes "profit-sharing" as that term is used in the Internal Revenue Cod If this Court undertakes to answer that question it will clarify a segment of the Internal Revenue Code which is daily becoming of increasingly greater importance as more and more employers institute deferred compensation arrangements as a means of sharing the success of their enterprises with their employees. The opinion of the court below states that to find the plan of petitioner a "profit-sharing plan" would be an expansion of the code "by strained construction". (App., infra, p. 12a). This is clearly erroneous, and if this decision stands as a precedent it will unduly restrict the scope and variety of forms which profit-sharing may take without incurring severe penalties under the Internal Revenue Code.

This Court has heretofore rendered no decision which may serve as a guidepost in implementing the legislation involved here, but the Courts of Appeals of a number of Circuits, prior to rendition of the decision of the court below, have interpreted and applied this legislation. The decisions rendered in other Circuits have invariably recognized that, in enacting the elaborate and complicated statutes dealing with deferred compensation arrangements, Congress was concerned primarily with insuring that the plans be operated for the benefit of employees in general and not used as a device for benefiting shareholders, officers or highly paid employees alone. **Tavannes Watch Co. v. Commissioner**, 176 F. 2d 211 (2nd Cir.); **Lincoln Electric Co. v. Employees' Profit-Sharing Trust v. Commissioner**, 190 F. 2d 326 (6th Cir.); **Commissioner v. Produce Reporter Company**, 207 F. 2d 586 (7th Cir.); **McClintock-Trunkey Co. v. Commissioner**, 217 F. 2d 329 (9th Cir.). These decisions further recognized that if these basic objectives were fulfilled Congress was not particularly concerned with the exact form of any plan or the means by

which the sharing of profits was effected. These decisions in fact have held that Congress desired to encourage non-discriminatory deferred compensation arrangements such as profit-sharing; and accordingly the courts of these other Circuits have established an interpretation of this legislation to which the decision below is completely opposed. These cases have explained and enforced the Congressional intent. The Court below has ignored it.

The Court of Appeals did recognize that the question presented is a difficult one and that there was no judicial precedent directly in point:

> "The remaining and most troublesome question is whether or not the taxpayer's contributions could be considered as having been made to a profit-sharing plan. Other than the two decisions reviewed here, no court has considered the problem of what constitutes a 'profit-sharing' plan within the meaning of the statute" (C. A. Op., infra, p. 7a).

Petitioner submits that the Court below, by ignoring the Congressional intent, achieved the wrong solution to this problem.

The legislation involved here is embodied in Sections 165 (a) and 23 (p) of the Internal Revenue Code of 1939, as amended. The enactment of the Internal Revenue Code of 1954 has produced no changes of substance which are material here. Section 401 (a) of the 1954 Code is the equivalent of the former Section 165 (a), and Section 404 of the 1954 Code is the equivalent of the former Section 23 (p).

CONCLUSION.

The decision below unduly restricts the concept of "profit-sharing" as employed in the Internal Revenue Code and consequently injects uncertainty and incon-

sistencies into the tax system. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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